Journal of Natural Resources & Environmental Law

Volume 4
Issue 2 *Journal of Mineral Law & Policy, volume 4, issue 2*

Article 7

January 1989

International Paper and Interstate Water Pollution: A Two-Ton Problem in a One-Ton Regulatory Garbage Bag

Genie B. Whitesell
University of Kentucky

International Paper and Interstate Water Pollution: A Two-Ton Problem in a One-Ton Regulatory Garbage Bag

INTRODUCTION

Congress enacted the Federal Water Pollution Control Act (the Act) in 1948.[1] The original Act was deficient in many respects,[2] and in 1972 Congress restructured it into "a comprehensive program for controlling and abating water pollution."[3] Congress set as its ultimate goal the total elimination of "pollutants in the navigable waters of the United States."[4] The 1972

---

[1] Federal Water Pollution Control Act, ch. 758, 62 Stat. 1155 (1948) (current version at 33 U.S.C. §§ 1251-1376 (1982 & Supp. IV 1986)) (commonly referred to as the Clean Water Act). The Act was revised several times after 1948. *See* annotation following 33 U.S.C.A. § 1251 (West 1986).

[2] The Act required each state to set its own water quality standards, and the Secretary of Interior was then supposed to approve or reject each state's plan. The program proved ineffective. In EPA v. California *ex rel.* State Water Resources Control Bd., 426 U.S. 100 (1976), the Supreme Court commented: "The problems stemmed from the character of the standards themselves, which focused on the tolerable effects rather than the preventable causes of water pollution, from the awkwardly shared federal and state responsibility for promulgating such standards, and from the cumbrous enforcement procedures." *Id.* at 202. When drafting the 1972 Amendments, the Senate Public Works Committee concluded that "the national effort to abate and control water pollution . . . ha[d] been inadequate in every vital aspect. . . ." S. REP. No. 414, 92d Cong., 2d Sess. 5, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 3668, 3674.

A more detailed description of the features of the Act prior to 1972 is beyond the scope of this Comment. *See generally* 426 U.S. at 203-04; McThenia, *An Examination of the Federal Water Pollution Control Act Amendments of 1972*, 30 WASH. & LEE L. REV. 195, 198-202 (1973); Note, *Federal Common Law and Water Pollution: Statutory Preemption or Preservation*, 49 FORDHAM L. REV. 500, 503 (1981).

[3] Train v. City of New York, 420 U.S. 35, 37 (1975).

[4] 33 U.S.C. § 1251(a)(1) (1986). The drafters intended for the Amendments to provide three essential elements: (1) *uniformity* — through uniform national standards of effluent limitations imposed upon certain categories of industries and municipalities; (2) *finality* — by setting specific goals; and (3) *enforceability* — by means of a discharger permit program. *See* R. LUKEN, E. PECHAN, WATER POLLUTION CONTROL — ASSESSING THE IMPACTS AND COSTS OF ENVIRONMENTAL STANDARDS, 1-8 (1977).

Amendments reflected Congress' "continuing attempt to balance an industrial society's need to consume natural resources and dispose of waste materials with its desire to protect personal health, safety, and property."[5]

The Federal Water Pollution Control Act Amendments of 1972 (1972 Amendments)[6] established a regulatory system which attacks water pollution primarily by imposing effluent limitations[7] on all point sources[8] of pollutant discharges.[9] The National Pollutant Discharge Elimination System (NPDES) permit program operates as the primary enforcement mechanism.[10] The federal government and the individual states share the responsiblity for administering the program.[11] Congress believed that the program's joint administrative feature would offer states a "significant role in protecting their own natural resources."[12]

In reality, the Act and its 1972 Amendments have compromised the states' ability to deal adequately with water pollution

---

[5] Glicksman, *Federal Preemption and Private Legal Remedies for Pollution*, 134 U. PA. L. REV. 121, 123 (1985).

[6] Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251-1376 (1982 & Supp. IV 1986)). For a more comprehensive description of the 1972 Amendments, *see* Smith, *Highlights of the Federal Water Pollution Control Act Amendments of 1972*, 77 DICK. L. REV. 459 (1973).

[7] An "effluent limitation" is "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters . . . ." 33 U.S.C. § 1362(11) (1982 & Supp. IV 1986).

[8] A "point source" is "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (1982 & Supp. IV 1986).

[9] A "pollutant" is "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6) (1982 & Supp. IV 1986). A "discharge of pollutant" is "any addition of any pollutant to navigable waters from any point source. . . ." 33 U.S.C. § 1362(12)(A) (1982 & Supp. IV 1986).

[10] *See infra* text accompanying notes 17-26.

[11] 33 U.S.C. § 1251(g) (1982 & Supp. IV 1986) (providing "federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources"). *See also* 33 U.S.C. §§ 1342(b), (d), 1370 (1982 & Supp. IV 1986).

[12] International Paper Co. v. Ouellette, 479 U.S. 481, 486 (1987). *See* 33 U.S.C. § 1251(b) (1982 & Supp. IV 1986).

from sources outside their borders. The problem arises when one state's territory is polluted by effluents discharged from a source in another state, despite the source's compliance with its federally approved discharge permit.[13] Courts have found the ambiguous saving clauses[14] of the Act difficult to interpret and apply in these interstate pollution cases. This inherent problem has generated considerable litigation,[15] culminating in the United States Supreme Court's holding in *International Paper Company v. Ouellette*.[16]

This Comment examines *International Paper* and its implications. The Comment begins with a discussion of the regulatory framework and the remedy provisions of the Clean Water Act. A brief examination of significant prior cases reveals the difficulties courts experienced in attempting to interpret and apply the Act's remedy provisions. The Comment then analyzes the *International Paper* opinion and partial dissent, and concludes that it demonstrates that problems and inequalities are built into the Act's ambiguous remedy provisions, particularly in the context of interstate pollution. The Comment finally suggests a practical statutory solution to the problem.

I. REGULATORY FRAMEWORK

A. The NPDES Permit Program

Under the Clean Water Act, any party planning to discharge pollutants into a navigable body of water must obtain a permit issued either through the Environmental Protection Agency (EPA)

---

[13] *See* Stewart, *Interstate Resource Conflicts: The Role of the Federal Courts*, 6 HARV. ENVT'L. L. REV. 241, 260-63 (1982). *See generally* Comment, *The Dilemma of the Downstream State: The Untimely Demise of Federal Common Law Nuisance* [hereinafter *Dilemma*], 11 B.C. ENVT'L. AFF. L. REV. 297 (1983-84).

[14] *See infra* notes 31-35 and accompanying text.

[15] *See e.g.*, cases cited *infra* notes 51, 54. *See also e.g.*, Love v. New York State Dept. of Envtl. Conserv., 529 F. Supp. 832 (S.D.N.Y. 1981); Hands v. Costle, 501 F. Supp. 195 (E.D. Va. 1980); Chesapeake Bay Foundation v. Virginia State Water, 495 F. Supp. 1229 (E.D. Va. 1980); United States Steel Corp. v. Train, 556 F.2d 822 (7th Cir. 1977).

[16] 479 U.S. 482 (1987).

or through an approved state permit program.[17] The permit sets specific effluent discharge limitations for the applicant.[18] The issuance of a permit officially certifies that the applicant's proposed discharge plan falls within the guidelines set by the EPA.[19]

Before the permit is issued, the permit issuing agency must notify other states whose land or waters might be affected by the discharge.[20] Those states may object or recommend changes[21] to the permit's specifications at a public hearing.[22] Notwithstanding these protective devices, a complaining state is in a "subordinate position"[23] because the issuing agency is free to reject the affected state's recommendations.[24] The complaining state's only

---

[17] 33 U.S.C. §§ 1311(a), 1342(a)-(c) (1982 & Supp. IV 1986). The Act makes it illegal for anyone to discharge pollutants without a permit. Under the NPDES, the EPA Administrator issues permits. The Administrator may delegate the permit issuing authority to a state agency after approving the state's entire water pollution control program. Should the party apply for a federal permit, the party first must be certified by the state where the discharge will occur. 33 U.S.C. § 1341 (1982 & Supp. IV 1986). The section provides:

> Any applicant for a federal . . . permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the . . . permitting agency a certification from the State in which the discharge originates or will originate . . . that any such discharge will comply with the applicable provisions. . . . No license or permit shall be granted if certification has been denied by the State . . . or the Administrator, as the case may be. *Id.*

See also Monongahela Power Co. v. Marsh, 809 F.2d 41 (D.C. Cir. 1987); Snyder v. Callaghan, 284 S.E.2d 241 (W.Va. 1981).

[18] 33 U.S.C. §§ 1342(a)-(c) (1982 & Supp. IV 1986).

[19] While the EPA guidelines set minimum standards that may not be lowered, states may set higher standards for point sources within their borders. *See* 33 U.S.C. §§ 1314(b), 1370 (1982 & Supp. IV 1986).

[20] 33 U.S.C. §§ 1341(a)(2), 1342(a)(1) (1982 & Supp. IV 1986). Section 1342(b) specifies the requirements to which a state permit agency must comply. Permits issued directly by the EPA must also meet the requirements set out in Section 1342(b). 33 U.S.C. § 1342(a)(3) (1982 & Supp. IV 1986). Further, the Act also requires a state to notify and send a copy of each permit application to the Administrator. 33 U.S.C. §§ 1342(b)(4), 1342(d)(1) (1982 & Supp. IV 1986).

[21] 33 U.S.C. § 1342(b)(5) (1982 & Supp. IV 1986).

[22] 33 U.S.C. §§ 1342(a)(1), (b)(3) (1982 & Supp. IV 1986).

[23] International Paper Co. v. Ouellette, 479 U.S. 481, 490 (1987) (also commenting that an affected state has only an advisory role in regulating pollution that originates beyond its borders).

[24] *See e.g.*, Tennessee v. Champion Int'l Corp., 709 S.W.2d 569 (Tenn. 1986) *cert. granted*, 479 U.S. 1061 (1987). "A duly authorized permit from the EPA or from an authorized state should, and in our opinion, must, afford some protection to the holder thereof, who frequently has obtained it at enormous expense." 709 S.W.2d at 576.

recourse is to request the EPA to review and veto the permit.[25] In reality, the federal review of state permits has been rare.[26]

B. Remedies Under the Act

The Clean Water Act concentrates on the regulatory aspects of water pollution.[27] Accordingly, the Act contains two provisions which deal specifically with permit violations.[28] Such violations can ultimately result in civil or criminal monetary penalties which are paid to the federal government.[29]

Notwithstanding the Act's comprehensive permit scheme, pollution injuries continue to occur even when the discharger has faithfully complied with its permit.[30] In the interstate context, the Act's remedy provisions are inadequate to fairly redress such injuries.

Recognizing that injuries would occur, Congress included two saving clauses[31] in the Act which preserve (theoretically) an injured party's right to compensation for water pollution injuries. Because the provisions are vaguely worded, however, courts have experienced great difficulty in applying them.[32]

---

[25] 33 U.S.C. § 1342(d)(2) (1982 & Supp. IV 1986). *But see* 33 U.S.C. § 1369(b)(1)(F) (1982 & Supp. IV 1986) (providing review of Administrator's decision in the United States Circuit Court of Appeals).

[26] Comment, *Dilemma*, *supra* note 13, at 356. *See also* Note, *Adjudicatory Hearings Under the NPDES*, 9 ECOLOGY L.Q. 1, 17, 30-32 (1980); *but see* Champion Int'l Corp. v. United States Environmental Protection Agency, 648 F. Supp. 1390 (S.D.N.C. 1986).

[27] *See supra* note 4 and accompanying text. *See generally* Note, *City of Milwaukee v. Illinois: The Demise of the Federal Common Law of Water Pollution*, 52 WIS. L. REV. 627, 664-71 (1982) [hereinafter *The Demise*].

[28] 33 U.S.C. §§ 1319, 1365 (1982 & Supp. IV 1986) (government enforcement and citizens suits, respectively).

[29] 33 U.S.C. § 1319 (1982 & Supp. IV 1986); *see* County of Oneida v. Oneida Indian Nation, No. 83-1065 (Mar. 4, 1985), slip op. 9 (providing that penalties are paid to United States Treasury).

[30] This consequence, of course, will continue to occur until pollution is eliminated completely. Congress initially set 1985 as the target date for total elimination, but extended the date to March 1, 1989 in the Water Quality Standard Act of 1987. As with any problem of great magnitude (such as our federal budget deficit), pollution will continue to plague the nation.

[31] 33 U.S.C. §§ 1365(e), 1370(2) (1982 & Supp. IV 1986).

[32] *See* cases cited *supra* note 15.

The section of the Act permitting "any citizen" to sue a polluter or the Administrator[33] contains a savings clause (Section 505(e)), which provides that "[n]othing in this section shall restrict *any right* which any person (or class of persons) may have *under any statute or common law* to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a state agency). . . ."[34] Another savings clause (Section 510(2)), contained in the section listing the powers of the states under the Act, provides that "[n]othing in [the Act] shall be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States."[35]

In drafting the Clean Water Act, Congress was more concerned with preventing water pollution than in redressing injuries caused by water pollution.[36] Therefore, Congress included the Act's savings clauses to preserve existing statutory and common law remedies, thereby maintaining the status quo.[37] Because of the vagueness of the clauses, however, the courts have spent

---

[33] 33 U.S.C. § 1365(2) (1982 & Supp. IV 1986) states the following:

> [A]ny citizen may commence a civil action . . . (1) against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or (2) against the Administrator where there is alleged failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator. *Id.*

[34] 33 U.S.C. § 1365(e) (1982 & Supp. IV 1986) (emphasis added).

[35] 33 U.S.C. § 1370(2) (1982 & Supp. IV 1986). Section 1370(1) additionally contains the following:

> Nothing in this chapter shall (1) preclude or deny the right of any State . . . to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation . . . is in effect under this chapter, such State . . . may adopt or enforce any effluent limitation . . . which is less stringent than the effluent limitation . . . under this chapter.

[36] *See* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 13-18 n. 27 (1981) (citing Senate Report containing statements made by senators in 116 CONG. REC. 33100-33104 (1970)).

[37] "[T]he section . . . specifically preserve[s] any rights or remedies under any other law. Thus, if damages [can] be shown, other remedies . . . remain available. Compliance with requirements under this Act [are] not . . . a defense to a common law action for pollution damages." S. REP. No. 414, 92d Cong., 2d Sess. 5, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 3668, 3746-47.

more energy interpreting the clauses than applying them. Traditionally, the courts' difficulties in interpreting the clauses have had two sources: (1) the problem of whether federal or state law applies; and (2) if state law applies, the problem of whether the source state's law or the affected state's law controls.

II. LITIGATION PRIOR TO *International Paper*

Parties injured by interstate water pollution traditionally have turned to the federal court system for relief.[38] The United States Supreme Court, in the first part of the twentieth century, relied in these cases almost exclusively on the federal common law of public nuisance.[39]

The climax and fall of the federal common law of water pollution came about through a line of cases involving a dispute between Milwaukee and Illinois over Milwaukee's excessive sewage pollution into Lake Michigan.[40] This line of cases sets the stage for *International Paper.*

A. Milwaukee I

In *Illinois v. City of Milwaukee, Wisconsin (Milwaukee I)*,[41] Congress' frequent attempts to regulate water pollution are traced

---

[38] *See e.g.*, Missouri v. Illinois, 200 U.S. 496, 521 (1906) (stating "Before this court ought to intervene the case should be of serious magnitude, clearly and fully proved. . . ."). *See infra* text accompanying notes 41-48. *See also* New Jersey v. New York City, 283 U.S. 473, 481-82 (1931); North Dakota v. Minnesota, 263 U.S. 365 (1923); New York v. New Jersey, 256 U.S. 296, 313 (1921). *Cf.* Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) (an air pollution case in which the Supreme Court recognized a state's quasi-sovereign interests in protecting its natural resources from nuisances caused by out-of state sources).

[39] *See* Glicksman, *supra* note 5, at 152-55. The author states that the Supreme Court relied on federal common law to protect one state's natural resources from invasion by another state, and to avoid or resolve disputes between the states." *Id.* at 152 (footnote omitted).

In many of the early twentieth century cases, the Supreme Court invoked its original jurisdiction. However, in Ohio v. Wyandotte Chem. Corp., 401 U.S. 493 (1971), the Court refused to exercise its original jurisdiction because of the complex facts of the dispute. The court stated, "[A]n action such as this, if otherwise cognizable in federal district court would have to be adjudicated under state law." *Id.* at 498 n.3 (citing Erie R. Co. v. Tompkins, 304 U.S. 64 (1938). The Court later overruled the case in *Milwaukee I.*

[40] *See infra* notes 41-70 and accompanying text.

[41] 406 U.S. 91 (1972) (seeking injunction to abate excessive untreated sewage dumped into Lake Michigan) [hereinafter *Milwaukee I*].

from the 1890s through the Federal Water Pollution Control Act as it existed in 1971.[42] The Court held that such legislation demonstrated a sufficiently strong federal interest in controlling and preventing water pollution to form a sufficient basis for federal question jurisdiction under 28 U.S.C. section 1331(a).[43] The Court further stated that the overriding federal interest in interstate waters required that rules of decision in this area not vary from state to state.[44] The Court specifically held that federal common law preempts state common law in interstate water pollution disputes until "new federal laws and new federal regulations . . . pre-empt the . . . federal common law of nuisance."[45]

After *Milwaukee I*, federal courts attempted to use the federal common law of nuisance to resolve interstate water pollution disputes.[46] However, because of the vagueness of the concepts underlying nuisance law,[47] courts were unable to craft a uniform method of utilizing nuisance law to resolve water pollution disputes.[48] Before the courts could establish such a rule, Congress passed the 1972 Amendments to the Act.[49]

---

[42] *Id.* at 101-03.

[43] *Id.* at 99-101. 28 U.S.C. § 1331(a) (1982 & Supp. IV 1986) provides that "district courts shall have original jurisdiction of all civil actions . . . aris[ing] under the Constitution, laws, or treaties of the United States." In *Milwaukee I*, the Court quoted *Texas v. Pankey*, 442 F.2d 236, 240 (10th Cir. 1971):

> As the field of federal common law has been given necessary expansion into matters of federal concern and relationship (where no applicable federal statute exists, as there does not here), the ecological rights of a State in the improper impairment of them from sources outside of the State's own territory, now would and should, we think, be held to be a matter having basis and standard in federal common law and so directly constituting a question arising under the laws of the United States.

Id.

[44] 406 U.S. at 105 (quoting from Hinderlider v. LaPlata Co., 304 U.S. 92, 110 (1938): "The question of apportionment of interstate waters is a question of 'federal common law' upon which State statutes or decisions are not conclusive.").

[45] *Id.* at 107.

[46] *See* Note, *The Demise*, *supra* note 28, at 636-40.

[47] *See* W. PROSSER & W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS, 616 (5th ed. 1984) ("There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' ").

[48] Rather than creating a uniform rule, the Supreme Court, in *Milwaukee I*, proposed a case-by-case method. The Court stated that "federal courts will be empowered to appraise the equities of . . . suits alleging creation of a public nuisance by water pollution." *Milwaukee I*, 406 U.S. at 107.

[49] 33 U.S.C. §§ 1251-1376 (1982 & Supp. IV 1986).

B. *Milwaukee II*

The same dispute involved in *Milwaukee I*[50] engendered *City of Milwaukee v. Illinois and Michigan* (*Milwaukee II*).[51] *Milwaukee II* held that the Clean Water Act preempted federal common law[52] because Congress had "occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency."[53]

In the same year, the Court also handed down *Middlesex County Sewerage Authority v. National Sea Clammers Association*.[54] In *National Sea Clammers*, an association of shell fishermen brought a class action against various government officials and alleged permit violations under the Clean Water Act.[55] The Court held that the Act did not provide an implied private action damage remedy.[56]

C. *Milwaukee III*

Read together, *Milwaukee II* and *National Sea Clammers* "eliminated all opportunities for private persons to seek damages under federal law for injuries caused by activities regulated under

---

[50] In *Milwaukee I*, the Supreme Court remanded the case to the United States Federal District Court for the Northern District of Illinois. Illinois thereafter filed a complaint. Illinois v. City of Milwaukee, 366 F. Supp. 298 (N.D. Ill. 1973). After four years of discovery and pretrial motions, the case went to trial. After a four month trial, the court made extensive technical findings and decided that Milwaukee's excessive sewage dumping constituted a nuisance under federal common law. *Id.* at 299. On appeal, the United States Court of Appeals for the Seventh Circuit affirmed that part of the district court's holding, 500 F.2d 151, 174 (7th Cir. 1979). The Supreme Court then granted certiorari to Milwaukee to determine the effect of the 1972 Amendments in interstate water pollution disputes.

[51] 451 U.S. 304 (1981) [hereinafter *Milwaukee II*].

[52] *Id.* at 315-16 ("Our 'commitment to the separation of powers is too fundamental' to continue to rely on federal common law 'by judicially decreeing what accords with "common sense and the public weal" ' when Congress has addressed the problem." Quoting TVA v. Hill, 437 U.S. 153, 195 (1978).

[53] *Id.* at 317.

[54] 453 U.S. 1 (1981).

[55] *Id.* at 1.

[56] *Id.* at 22. *Accord* City of Evansville, Ind. v. Kentucky Liquid Recycling, Inc., 604 F.2d 1008 (7th Cir. 1979) *cert. denied*, 444 U.S. 1025 (1980); Sierra Club v. SCM Corp., 580 F. Supp. 862 (D.C.N.Y. 1984), *aff'd* 747 F.2d 99 (2nd Cir. 1984); City of Philadelphia v. Stephan Chem. Co., 544 F. Supp. 1135 (E.D. Pa. 1982); Pruitt v. Allied Chem. Corp., 523 F. Supp. 975 (E.D. Va. 1981).

the Act."[57] One question still remained, however. The Supreme Court had not yet addressed the question of the extent to which (if at all) the savings clauses had preserved *state* law.[58] *Milwaukee II* held only that the Clean Water Act had supplanted *federal* common law. While *Milwaukee II* was pending in the Supreme Court, the state of Illinois and several Illinois residents filed property damage suits in the United States District Court for the Northern District of Illinois alleging that municipalities in Wisconsin and Indiana had polluted Lake Michigan.[59]

In *Illinois v. City of Milwaukee* (*Milwaukee III*),[60] the United States Court of Appeals for the Seventh Circuit became the first appellate court to address the extent to which the Clean Water Act permitted state common law to apply to interstate water pollution injury disputes. Relying on the logic of *Milwaukee I* and *Milwaukee II*, the Seventh Circuit emphasized the dominance of federal interests in the area of interstate waterways.[61] Because each affected state had competing and conflicting interests in a common body of water, the court concluded that the controversy was "inappropriate for state law resolution."[62] The comprehensive Clean Water Act was, therefore, a federal attempt to govern interstate waters in the most uniform manner.[63] After demonstrating the continuing significance of *Milwaukee I* and *Milwaukee II*, the Seventh Circuit concluded that federal

---

[57] Glicksman, *supra* note 5, at 121.

[58] Illinois' complaint also had sought relief under Illinois statutory and common law. 366 F. Supp. at 300. The Court of Appeals ruled, pursuant to *Milwaukee I*, that because federal common law controlled in the case, the state claims were not viable. Illinois v. City of Milwaukee, 599 F.2d 151, 177 n. 53 (7th Cir. 1979). The Supreme Court subsequently denied Illinois' petition for certiorari on the issue of state claims. 451 U.S. at 982 (1981).

[59] Three different actions were consolidated. For a helpful summary, *see* Illinois v. City of Milwaukee, 731 F.2d 403, 404-06 (7th Cir. 1984).

[60] 731 F.2d 403 (7th Cir. 1984) *cert. denied*, 469 U.S. 1196 (1985) [hereinafter *Milwaukee III*].

[61] *Id.* at 407-09. *See also supra* text accompanying notes 38-54.

[62] 731 F.2d at 410. "There are legitimate state concerns on both sides of the question. . . . There is a controversy of federal dimensions, implicating the conflicting rights of states and inappropriate for state law resolution." *Id.*

[63] *Id.* at 410-11. *But see* Stewart, *supra* note 13, at 261 ("uniform measures . . . do not come to grips . . ." with problems).

law governed interstate water pollution "except to the extent that the . . . [Act] authorize[d] resort to state law."[64]

The Seventh Circuit ultimately held that the Clean Water Act preserved state law at least to the extent that an injured party could seek redress under the law of the state where the source of the pollution originated.[65] But the court also held that the Act preempted the application of the laws of the state where the pollution injury occurred.[66]

The importance of *Milwaukee III* lies in the narrowness of the Seventh Circuit's interpretation of the Clean Water Act's two savings clauses.[67] The Seventh Circuit determined that the savings clause dealing with the authority of the states merely saved "the right and jurisdiction of a state to regulate activity occurring within the confines of its boundary waters."[68] Likewise, the Court held that the savings clause which deals with the rights of "any citizen," refers solely to rights under the law of the state in which the discharge occurred.[69] The Court reasoned that imposing the common law standards of multiple affected states would "lead to a chaotic confrontation between sovereign states," thereby "undermin[ing] the uniformity and state cooperation envisioned by the Act."[70]

---

[64] 731 F.2d 403, 411 (7th Cir. 1984).

[65] *Id.* at 414.

[66] *Id.*

[67] *See supra* notes 31-35 and accompanying text.

[68] 731 F.2d at 413 (determining a broader construction would cause "conflict and confusion").

[69] *Id.* at 414. The court noted the following:

> [I]t seems implausible that Congress meant to preserve or confer any right of the state claiming injury (State II) or its citizens to seek enforcement of limitations on discharges in State I by applying the statutes or common law of State II. Such a complex scheme of interstate regulation would undermine the uniformity and state cooperation envisioned by the Act. For a number of different states to have independent and plenary regulatory authortiy over a single discharge would lead to chaotic confrontation between sovereign states. Dischargers would be forced to meet not only the statutory limitations of all states potentially affected by their discharges but also the common law standards developed through case law of those states. It would be virtually impossible to predict the standard for a lawful discharge into an interstate body of water. Any permit issued under the Act would be rendered meaningless. In our opinion Congress would not have intended such a result. *Id.*

[70] *Id.*

III. *INTERNATIONAL PAPER COMPANY V. OUELLETTE*

A. Background

While *Milwaukee III* was pending in the Seventh Circuit, the state of Vermont and a class of Vermont residents filed suit in Vermont state court against International Paper Company,[71] who promptly removed the case to the United States District Court for the District of Vermont.[72]

International Paper operated a paper mill in New York beside Lake Champlain. The plaintiff class, who lived on the opposite shore, alleged that effluents from the paper mill were interfering unreasonably with their use and enjoyment of their property. The plaintiffs sought money damages and injunctive relief.[73] The defendants filed for a motion to dismiss.[74]

The district judge, like the Seventh Circuit in *Milwaukee III*, had to determine the preemptive scope of the Clean Water Act. International Paper contended that the court should follow *Milwaukee III* and hold that the Clean Water Act's savings clauses preserved only the laws of the state where the discharge occurred.[75] The court declined to do so,[76] adopting instead a much broader interpretation, and holding that the savings clause did preserve actions to redress interstate water pollution under the law of the affected parties' state.[77] This holding reflected the court's desire to allow a state to exercise police power over its shores, despite the enactment of the comprehensive Act.[78]

---

[71] Ouellette v. International Paper Co., 479 U.S. 481, 484 (1987). The plaintiffs owned or leased property in Vermont across Lake Champlain from International Paper's paper mill. For a summary of prior litigation between these two parties, *see* Ouellette v. International Paper Co., 86 F.R.D. 476 (1980).

[72] Ouellette v. International Paper Co., 602 F. Supp. 264 (D. Vt. 1985), *aff'd in part, rev'd in part*, 479 U.S. 481 (1987).

[73] 602 F. Supp. at 266. The complaint also contained an air pollution cause of action. *See* Ouellette v. International Paper Co., 666 F. Supp. 58 (D. Vt. 1987).

[74] 602 F. Supp. at 266.

[75] *Id.* at 268. *See supra* text accompanying notes 59-69.

[76] 602 F. Supp. at 271-72.

[77] *Id.* at 272 (basing decision on express language of saving clauses as well as legislative history and stated objectives of Act).

[78] The court also discredited *Milwaukee III*'s holding, because it "create[d] a choice-of-law rule that deviates without legislative authorization, from well-settled choice of law principles." *Id.* at 270.

The United States Court of Appeals for the Second Circuit affirmed the decision[79] and the Supreme Court granted certiorari to resolve the conflict between the circuits.[80]

B. *Holding*

In *International Paper*[81] the Supreme Court concluded that a court deciding a nuisance claim involving interstate water pollution subject to the Clean Water Act "*must* apply the law of the State in which the point source is located."[82] The Court reasoned that the application of an affected state's law would indirectly regulate a discharge acting in compliance with its permit.[83]

By holding that no court could apply the law of the affected state, the majority created a major exception to well-settled conflict-of-law principles.[84] Under traditional conflict-of-law principles, "the affected State's nuisance law may be applied when the purpose of the tort law is to ensure compensation of tort victims."[85] In his partial dissent, Justice Brennan found that the majority had misread Congressional intent in deviating from well-settled law. He concluded: "I find that the Act's plain language clearly indicates that Congress wanted to leave intact the traditional right of the affected State to apply its own tort law when its residents are injured by an out-of-state polluter."[86]

IV. ANALYSIS

International Paper finally settled the meanings of the Clean Water Act's two savings clauses. The Seventh Circuit had read them narrowly[87] while the Second Circuit had read them broadly.[88]

---

[79] 776 F.2d 55 (2nd Cir. 1985) (*per curiam*).

[80] International Paper Co. v. Ouellette, 479 U.S. 481, 487 (1987).

[81] 479 U.S. 481 (1987).

[82] *Id.* at 481, 496 (emphasis added).

[83] *Id.* at 813.

[84] *Id.* at 502 (Brennan, J., dissenting). *See infra* notes 129-38 and accompanying text.

[85] *Id.* (footnote omitted).

[86] International Paper Co. v. Ouellette, 479 U.S. 481, 504 (1987).

[87] *See supra* text accompanying notes 57-69.

[88] *See supra* text accompanying notes 71-80.

The Supreme Court adopted the Seventh Circuit's narrow interpretation,[89] which conclusively precludes a court from applying the affected state's law to redress any private injury resulting from activities subject to the Clean Water Act.

A. Majority Opinion

The Supreme Court displaced the law of affected states pursuant to general principles of federal preemption.[90] Before the Court passed judgment on the Clean Water Act's preemptive effect on state common law, the Court laid out some general preemption principles. The Court began "with the assumption that the historic police powers of the States [are] not to be [preempted] . . . unless that was the clear and manifest purpose of Congress."[91] When Congress has not expressly occupied a field, the Court will determine whether Congress has implicity preempted state law. One type of implicit preemption occurs when a federal regulatory scheme is so pervasive that the Court can reasonably infer "that Congress 'left no room' for supplementary state regulation."[92]

The Court must also determine whether the state law "actually conflicts with [the] . . . federal statutes."[93] One indication of whether the federal and state laws conflict is if the state law "interferes with the methods by which the federal statute was designed to reach [its stated] goal."[94] As a result of these rules, the federal law will displace the state law "only to the extent necessary to protect the achievement of the aims of the [federal act in question]."[95]

---

[89] *See supra* notes 81-83 and accompanying text.

[90] *See generally* J. NOWAK, R. ROTUNDA, N. YOUNG, CONSTITUTIONAL LAW 295-96 (3d ed. 1986) [hereinafter NOWAK].

[91] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

[92] 479 U.S. at 491 (quoting 331 U.S. at 230).

[93] Ray v. Atlantic Richfield Co., 435 U.S. 151, 158 (1978) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

[94] 479 U.S. at 494 (1987) (citing Michigan Canners & Freezers Ass'n v. Agricultural Mktg. & Bargaining Bd., 467 U.S. 461 (1984)).

[95] Chevron U.S.A., Inc. v. Hammond, 726 F.2d 483, 496 (9th Cir. 1984) (quoting Merrill Lynch, Pierce, Fenner & Smith v. Ware, 414 U.S. 117, 127 (1973)), *cert. denied*, 471 U.S. 1140 (1985). *See also* Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 257 (1984) (commenting that state law is preempted only to the extent that it actually conflicts with federal law).

In *International Paper*, the Supreme Court divided its preemption analysis of the Clean Water Act into three parts. First, it explained why the Act could preempt the affected state's laws without disturbing the source state's law.[96] Second, the Court demonstrated how the application of an affected state's laws "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress."[97] Finally, the Court confirmed that "nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the source State."[98]

The Supreme Court first discredited a broad reading of the savings clause,[99] holding that Congress intended the 1972 Amendments to the Act to "establish an all-encompassing program of water pollution regulation."[100] Notwithstanding the inclusion of the savings clause, Congress did not necessarily intend the clauses to be read as general savings clauses.[101] Congress deliberately refrained from addressing private damage claims for water pollution in the Clean Water Act.[102] At most, therefore, the provisions indicate that Congress did not intend to leave an injured party without some means of redress. A Senate Report confirms this conclusion: "[I]f damages could be shown, other remedies [in addition to a citizen suit] would remain available. *Compliance with requirements under this act would not be a defense to a common law action for pollution damages.*"[103]

When the Court stated its interpretation of the savings clauses, it focused on their plain language.[104] The Court interpreted the savings clauses as follows:

---

[96] *See infra* notes 99-107 and accompanying text.

[97] 479 U.S. at 492 (quoting Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 713 (1985)). *See infra* notes 108-19 and accompanying text.

[98] *Id.* at 497. *See infra* notes 121-23 and accompanying text.

[99] *Id.* at 492-93.

[100] *Id.* at 492.

[101] *Id.* at 494.

[102] *See* Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1, 13-18 & n. 27 (1981).

[103] S. REP. No. 414, 92nd Cong., 2d Sess. 81 (1971), *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 3668, 3746-47.

[104] 479 U.S. at 493. *But see id.* at 503 (Brennan, J., dissenting) (emphasizing that Section 510 also states "except as *expressly* provided," and Congress has not expressly preempted any law).

> Section 505(e) merely says that 'nothing in this section' i.e. the citizen-suit provision, shall affect an injured party's right to seek relief under state law; it does not purport to preclude preemption of state law by other provisions of the Act. Section 510, moreover, preserves the authority of a State 'with respect to the waters (including boundary waters) of such State[ ].' This language . . . limits the effect of the clause to . . . discharge from within the State.[105]

The Court seems to have placed little emphasis on the aforementioned Senate Report. Instead, the Court examined the Clean Water Act as a whole — including its purposes and history.[106] The Court concluded that "if affected States were allowed to impose separate discharge standards on a single point source, the inevitable result would be a serious interference with the achievement of the 'full purposes and objectives of Congress.' "[107]

In addition to finding an express preemption of non-source state law, the Court concluded that the Act also implicitly preempted an affected state's laws.[108] In this part of the opinion the Court focused on the Clean Water Act's primary enforcement mechanism, the permit system.[109] The Court noted that Congress established the permit system as the primary vehicle for achieving the Clean Water Act's ultimate goal — elimination of water pollution.[110] A permit may issue only after many complex decisions have been made by the EPA Administrator and by a source state's permit granting agency.[111] Because of the

---

[105] 479 U.S. at 493. The Court adopted this narrow interpretation of the clauses in part in *Milwaukee II* when it held that the Act preempted federal common law. *Milwaukee II*, 451 U.S. at 399. For a critical analysis of the Court's interpretation of the clauses in *Milwaukee II*, see Glicksman, *supra* note 5, at 159-67.

[106] 479 U.S. at 493.

[107] *Id.* at 493-94.

[108] *Id.* at 496-97.

[109] *See supra* text accompanying notes 17-27.

[110] 33 U.S.C. § 1251(a)(1) (1982 & Supp. IV 1986). *See supra* notes 3-12 and accompanying text. In his dissenting opinion, Justice Brennan argued that the majority opinion was placing greater importance on the permit system than the Act's main goal of elimination of pollution. 479 U.S. at 504 (Brennan, J. dissenting). *See also infra* notes 129-38 and accompanying text.

[111] 33 U.S.C. §§ 1341-1342 (1982 & Supp. IV 1986). *See supra* notes 17-27 and accompanying text.

complex nature of these decisions, the Act constitutes a delicate balancing of the conflicting interests of the federal and state governments, as well as of the conflicting interests among the states.[112]

The Court reasoned that Congress must have crafted such an intricate permit system because of a realization that huge costs would necessarily be incurred before pollution could be completely eliminated.[113] Therefore, the Court reasoned, Congress must have realized that it was preempting the law of non-source states when it enacted the 1972 Amendments.[114]

The Court then gave two examples of how an affected state's laws could undermine the Act's regulatory structure. First, a non-source state's nuisance laws could "effectively override both the permit requirements and the policy choices made by the source state."[115] The threat of liability could result in indirect regulation. By imposing its own nuisance laws on the discharger, a non-source state could impose more stringent requirements on the discharger's conduct than are imposed by its permit,[116] notwithstanding the discharger's compliance with its permit.[117]

The Court's second example of how non-source state laws could upset the Act's regulatory structure involved a permit holder who is subjected to the nuisance laws of several non-source states — a situation which "would only exacerbate the vagueness and resulting uncertainty"[118] of the Act and render meaningless any permit issued under it.[119] This, the Court held, "would undermine the important goals of efficiency and predictability in the permit system."[120]

The Court concluded its preemption analysis by demonstrating why the source states laws *were* preserved by the Act's savings clauses. The Court concluded that the source state's laws do not "disrupt the regulatory partnership established by the

---

[112] 479 U.S. at 495.
[113] *Id.* at 494.
[114] *Id.* at 494-95.
[115] *Id.* at 495.
[116] *Id.*
[117] 479 U.S. at 495.
[118] *Id.* at 496.
[119] *Id.* at 497 (quoting 731 F.2d 403, 414 (7th Cir. 1984)).
[120] *Id.* at 496.

permit system."[121] Moreover, the source state's law "prevents a source from being subject to an indeterminate number of potential regulations."[122] The Court concluded, therefore, that the source state's law does not "stand as an obstacle to the full implementation of the [Act]."[123]

The majority's analysis failed to distinguish between the different types of remedies an injured party might seek under the non-source state law.[124] Different remedies would affect the polluter in varying degrees. Injunctions and punitive damages clearly would regulate the source state in the impermissible manner the court described.[125] On the other hand, compensatory damages present a lesser threat to the federal scheme.[126] In fact, compensatory damage suits, based on state common law could "simultaneously promote [t]he main federal goal of eliminating water pollution entirely . . . and obey [t]he congressional command to leave state common law intact."[127] The majority, in a footnote, responded that "draw[ing] a line between the types of relief sought . . . [might compel a polluter] to adopt different or additional means of pollution control from those required by the Act."[128] This conclusion clearly indicates the Court's extreme reluctance to allow the states to interfere in any way with Congressional intent.

B. Dissent

Justice Brennan disagreed with the majority's conclusion that an affected state's court must apply the source state's nuisance

---

[121] *Id.* at 499.

[122] *Id.*

[123] 479 U.S. at 494. International Paper also argued that the Act precluded courts sitting in non-source states from adjudicating state-law suits, even under source state law. The Court rejected this argument because "the rule is settled that a district court sitting in diversity is competent to apply the law of a foreign State." *Id.* at 494-97.

[124] *Id.* at 494-97. *See* Brief for United States as Amicus Curiae at 17-28, International Paper Co. v. Ouellette, 479 U.S. 481 (1987) (No. 85-1233) [hereinafter Brief].

[125] *See* Brief, *supra* note 124, at 17-22.

[126] *See id.*

[127] 479 U.S. at 506 (Brennan, J. dissenting) (citing Pacific Gas & Electric Co. v. Energy Resources Cons. & Dev. Comm'n., 461 U.S. 190, 221-23 (1983)).

[128] International Paper v. Ouellette, 479 U.S. 481, 496 n.19 (1987).

law.[129] A main premise of his argument focused upon the majority's divergence from well-settled conflict-of-law principles.[130] Under most states' conflict-of-law rules, a court applies the tort law of the state where the injury has occurred.[131] Justice Brennan argued that the Clean Water Act provides no support for the majority opinion's deviation. He defended his position with language from the contested savings clause. The savings clauses of section 510 states: "Except as *expressly* provided . . ., nothing in this chapter shall . . . be construed as impairing or *in any manner affecting any right* or jurisdiction *of the States with respect to the water (including boundary waters) of such states.*"[132] Therefore, Brennan concluded, Congress would have specifically preempted non-source state law if it actually intended to create an aberration in well-settled conflict-of-law principles.[133]

---

[129] Justice Brennan, joined by Justices Marshall and Blackmun, concurred in part and dissented in part. The Justices agreed that International Paper's motion to dismiss should be denied. However, the dissenters argued that the Court had improperly reached out to decide the choice-of-law problem, because the plaintiff class had not based its claims on any particular law. 479 U.S. at 501 (Brennan, J. dissenting). Justice Brennan then took up the issue of state law and stated his differences with the majority opinion.

In a separate dissenting opinion, Justice Stevens, joined by Justice Blackmun, joined the rest of the Court in denying International Paper's motion to dismiss. Agreeing with Brennan, Justice Stevens stated that the majority had surpassed the issue at bar. He believed the Court had merely issued an advisory opinion. He concluded by stating, "One cannot help but wonder what has happened to the once respected doctrine of judicial restraint." 479 U.S. at 509 (Stevens, J. dissenting).

[130] *See supra* notes 84-86 and accompanying text. A complete discussion of conflict-of-law rules is beyond the scope of this Comment. Basically, states have adopted two approaches that often give the same result. Justice Brennan outlined these two methods in his dissent. 479 U.S. at 502. Both the traditional rule of *lex loci delicti* and the newer interest analysis approach (which the Supreme Court applied in Allstate Ins. Co. v. Hague, 449 U.S. 302, 309 (1981)) often reach the same result. *Id.*

In its analysis, the majority explicitly discounted the importance of choice-of-law problems resulting from carrying out the objectives of Congress. 479 U.S. at 499. The Court noted: "This interference would occur . . . whether affected-state law applies as an original matter, or whether it applies pursuant to the source State's choice of law principles. Therefore, if . . . the law of a source State requires the application of affected-state substantive law . . . [then] it would be preempted as well." *Id.*

[131] *See* Brief *supra* note 124, at 7-8 & nn. 6-7 (quoting from International Paper's oral argument in Vermont v. New York, 406 U.S. 186 (1972), 408 U.S. 917 (1972), 409 U.S. 1103 (1973)).

[132] International Paper Co. v. Ouellette, 479 U.S. 481, 503 (1987) (Brennan, J. dissenting) (emphasis included) (citing 33 U.S.C. § 1370) (1982 & Supp. IV 1986).

[133] 479 U.S. at 503-04. *See* 33 U.S.C. § 1322(f) (1982 & Supp. IV 1986) (a section in which Congress expressly preempted states from adopting statutes).

Since Brennan read Section 510 to preclude implicit preemption, he argued that the majority opinion had unjustifiably contended that application of affected states' laws "stand [a]s an obstacle to the full implementation of the Act."[134] Moreover, Brennan supported his counterargument with legislative history.[135]

Brennan additionally contended that the Court should not automatically preempt a state's law when it merely conflicts with the federal law's subsidiary administrative objectives, but also furthers the federal statute's primary purpose.[136] A non-source state has traditionally had an interest in protecting its citizens; however, by subjecting polluters to state common law liability, the non-source state law may conflict with the Act's permit system. Yet, the liability imposed by the Act upon the polluter should encourage him to reduce his pollution discharges. Hence, while the non-source state law clashes with the administrative permit system, the main federal goal of pollution elimination has been furthered. Brennan concluded his argument by stating, "Congress intended to stand by its federal regulatory scheme and the State's traditional liability laws 'and to tolerate whatever tension there was between them.' "[137] If Congress were to disagree with a holding using this rationale, it could amend the statute.[138]

V. A PRACTICAL SOLUTION

International Paper demonstrates the difficulty faced by the Supreme Court in trying to adhere to the fundamental doctrine

---

[134] 479 U.S. at 504 (Brennan, J. dissenting). *See supra* note 129 and accompanying text.

[135] 479 U.S. at 504, Brennan cited the same Senate Committee report that the majority opinion cited. *See supra* note 103 and accompanying text. *See also infra* notes 141-43 and accompanying text (stating proposition that legislative history can generally be used by two opposing sides to establish argument).

[136] 479 U.S. 505-06 (Brennan, J. dissenting) (citing Pacific Gas & Electric Co. v. Energy Resources Conservation and Development Comm'n, 461 U.S. 190, 221, 223) (1983)).

[137] International Paper Co. v. Ouellette, 479 U.S. 481, 506 (1987) (quoting Silkwood v. Kerr-McGee Corp., 464 U.S. at 256 (1984)).

[138] *See* 461 U.S. at 223 (stating that "[t]he courts should not assume the role which our system assigns to Congress").

of separation of powers while construing a highly ambiguous piece of legislation. The Constitution limits the Court's authority to "interpreting the laws and adjudicating disputes under them."[139] The Court's efficiency in doing so is largely proportional to Congress' ability to draft legislation in clear and precise language.[140] Ambiguous language leaves the Court clouded in uncertainty, but the Constitution mandates, nevertheless, that the Court resolve the dispute at hand.

The Clean Water Act's savings clauses presented precisely this sort of interpretive problem in *International Paper*, compounded by the federalism implications of the Act's regulatory scheme. For example, the vague savings clauses do not distinguish between interstate and intrastate disputes. Nor do they distinguish between the different types of common law remedies an injured party might seek.

When faced with situations of this nature, the Court normally looks at the statute's legislative history to aid in determining legislative intent.[141] This interpretive tool, however, can itself present difficulties:[142] "As is frequently the case, legislative history yields contradictory indications which can be used to either [party's] advantage."[143]

The holding of *International Paper* clearly indicates the Court's valiant effort to discern Congress' intent. The Court's

---

[139] The separation of powers doctrine derives from the Constitution's tri-partite division of federal power. U.S. CONST. art. I-III. BLACK'S LAW DICTIONARY defines the doctrine in the following way:

> The government . . . [is] divided into three . . . branches: the legislative, which is empowered to make laws, the executive which is required to carry out the laws, and the judicial which is charged with interpreting the laws and adjudicating disputes under the laws. One branch is not permitted to encroach on the domain of another.

BLACK'S LAW DICTIONARY 1225 (5th ed. 1979).

In application, however, "the concept of separation of powers is not one that is capable of precise legal definition . . . [I]t does not yield clear solutions. . . ." NOWAK, *supra* note 90, at 122.

[140] *See* Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 32-39 (1985).

[141] *See* Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1230-31 (1982).

[142] *Id.* at 1231 (noting "[t]he more general and powerful the [legislative intent], the less likely it is to have been stated explicitly by the legislature, even if the legislature in fact shares that understanding.").

[143] Merrill, *supra* note 140, at 35.

holding is consistent with the purposes and objectives of the Clean Water Act, and with preserving state law except to the extent it conflicts with the Act. Yet, by holding that Congress intended to preempt non-source state laws, the Supreme Court implicitly held that Congress had also created an exception to well-settled conflict-of-law principles. Under *International Paper*, a court must apply source state substantive law to a non-source state injury.

The holding of *International Paper* discriminates against non-source states. Congress easily could eliminate this discrimination by adding a private cause of action to the Clean Water Act and eliminate the savings clauses from it.

A uniform federal remedy would eliminate the need for "judges . . . to puzzle out what to do" with the Act's vague saving clauses.[144] Congress should limit the type of available relief to compensatory damages. This would result in the added incentive of eliminating pollution more rapidly without upsetting the present federal regulatory scheme. If Congress were to insert a uniform federal remedy, the remedy could take into account the side effects that different types of remedies offer. Further, such federal legislation would erase the new exception to the traditional conflict-of-law rules. By placing greater (but Congressionally defined) risks on the pollutant dischargers, such an amendment to the Act would also encourage dischargers to reduce their discharge output, thereby advancing the very goal for which Congress enacted it — the eventual elimination of all water pollution.[145]

CONCLUSION

Courts traditionally have had difficulty resolving interstate water pollution disputes. The Federal Water Pollution Control Act Amendments of 1972 exacerbated already existing confusion. The Amendments did change the Act into a comprehensive water pollution abatement program,[146] but unfortunately Congress failed

---

[144] Friendly, *The Gap in Lawmaking — Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787, 792-93 (1963).

[145] *See supra* notes 124-26 and accompanying text.

[146] *See supra* notes 3-12 and accompanying text.

to include a provision granting an express statutory private cause of action under the Act.

The Act's two savings clauses purport to preserve a means by which an injured party may obtain redress under state law. However, the provisions do not explicitly state which state laws the Act preserves. Thus, courts interpreted the provisions differently after the 1972 Amendments were passed.[147]

In *International Paper* the Supreme Court interpreted the clauses to preserve the law of the state where pollution originates. But the Court held that the Act does preempt the law of a state where harm occurs, because application of the state's law would undermine the Act's regulatory structure.[148] Hence, the Act discriminates against non-source states and permit schemes by rendering them virtually powerless to deal with polluting damage to their territory and their citizens from sources beyond their borders.

International Paper may mark the end of a long history of confusion in the regulation of interstate water pollution. On the other hand, its holding illuminates a serious flaw in the way Congress has chosen to attack this problem. By eliminating the Act's savings clauses and creating a statutory private cause of action instead, Congress could eliminate that flaw.

GENIE B. WHITESELL

---

[147] *See supra* notes 31-35, 37, 60-66, 68-78 and accompanying text.

[148] *See supra* text accompanying notes 97-120.